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Boddie v. Connecticut: Free Access to Civil Courts for Indigents

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BODDIE v. CONNECTICUT: FREE ACCESS TO CIVIL COURTS FOR INDIGENTS

I. INTRODUCTION

On March 1, 1968 the National Advisory Commission on Civil Disorders, established amid urban turmoil the previous summer,[1] issued its final report.[2] After extensive investigation into the causes of the rioting, the Commission concluded that the disorders were a direct result of the "frustrations of powerlessness."[3] The volatile condition was generated by the existence of "no effective alternative to violence as a means of achieving redress of grievances, and of moving the system."[4] This alienation and hostility toward the institutions of law and government could only be eliminated by "increasing the capacity of our public and private institutions to respond to these problems."[5]

Three years later, the United States Supreme Court in *Boddie v. Connecticut*[6] rendered a decision increasing the capacity of the legal system to afford redress of grievances to a socio-economic class which was without access to the judicial process due to indigency. The Court held that the operation of Connecticut statutes,[7] which prevented the petitioners from dissolving their marriages because of inability to pay filing and service costs, was invalid under the due process clause[8] or the fourteenth amendment.[9] Although all but one of the justices agreed that access to the judicial process must be afforded in this civil action as a matter of right, the constitutional question elicited four separate and equally adamant opinions.[10] This Note will analyze and review the de-

1. Exec. Order No. 11,365, 3 C.F.R. 674 (1967).
2. Report of the National Advisory Commission on Civil Disorders.
3. *Id.* at 5.
4. *Id.*
5. *Id.* at 11.
6. 401 U.S. 371 (1971).
7. CONN. GEN. STAT. ANN. § 52-259-61 (Supp. 1971).
8. U.S. Const. amend. XIV, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
9. 401 U.S. 371 (1971).
10. 401 U.S. at 372-83 (Mr. Justice Harlan writing for the majority); 401 U.S. at 383-86 (Mr. Justice Douglas concurring); 401 U.S. at 386-89

velopment of the case law leading to *Boddie*, as well as recent cases involving similar appeals by indigents for free access to the civil courts.

II. Challenges to Delimit Access to the Courts Prior to Boddie

The basic controversy in *Boddie* was whether the state of Connecticut could limit access to the civil courts for a divorce by requiring a filing and service of process fee "from Gladys Boddie and persons similarly situated."[11] Although the issue of access presented in *Boddie* was one of first impression, similar cases concerning the limitation of the right to be heard have been before the courts. From these antecedent cases involving other access questions, the justices fashioned their several opinions in *Boddie*. An understanding of these civil and criminal access cases is a prerequisite to a proper comprehension and evaluation of the *Boddie* decision.

A. *Access to the Courts in Criminal Proceedings*

Initial entry into the judicial process has never been a problem in criminal cases. The government never constructed any barriers, financial or otherwise, to keep the prosecution or defense out of court.[12] The sixth amendment to the United States Constitution insures the criminally accused the opportunity to present his defense in court.[13] The difficulty concerning access in criminal cases arose when the state granted a statutory right to appeal convictions. The question confronting the courts was whether a criminal defendant could be denied an appeal because of his inability to pay filing fees or administrative costs due to indigency.

The issue was faced squarely by the Supreme Court in *Griffin v. Illinois*.[14] The petitioners sought to appeal their convictions for armed robbery. They, however, could not pay the fee needed to provide a report of the lower court proceedings. Only indigents sentenced to death were provided with free transcripts for appeals. Petitioners alleged that their indigency rather than the merit of

(Mr. Justice Brennan concurring); 401 U.S. at 389-94 (Mr. Justice Black dissenting).

11. The question was brought as a class action on behalf of women in Connecticut receiving welfare assistance and desiring to obtain a divorce but barred from filing their petitions by the inability to pay filing and service costs.

12. Hovey v. Elliot, 167 U.S. 409 (1897).

13. U.S. Const. amend. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

14. 351 U.S. 12 (1956).

their appeal had become the sole criterion for denying review of their convictions. They contended that the use of this economic determinant was a violation of the fourteenth amendment, due process and equal protection clauses. The trial court and the Illinois Supreme Court denied the petitioners' motion for free transcripts. The United States Supreme Court reversed these lower court decisions, holding that it was unconstitutional to deny review, once provision for review had been made, solely on the inability to pay a fee.[15] Justice Black, writing for the Court, stated: "plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."[16] The Court reasoned that just as a criminal defendant cannot be barred from the trial court because of indigency, "invidious discrimination" in the form of fees was unacceptable at the appellate level. Interpreting the fourteenth amendment the Court concluded: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[17] *Griffin* clearly established that access to the appellate courts, like the trial courts, for the criminally accused could not be limited by the financial hurdle of providing transcript costs.

In *Burns v. Ohio*,[18] the Court began to expand the application of *Griffin* by prohibiting the state from requiring an indigent to pay filing fees before allowing him to file a motion for leave to appeal. The Court declared: "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."[19] Likewise, in *Smith v. Bennett*,[20] the Supreme Court rejected the theory that a nominal fee of as little as four dollars was an acceptable limitation on the docketing of an application for a writ of habeas corpus.

Griffin, Burns, Smith and the subsequent Supreme Court rulings in *Lane v. Brown*[21] and *Gideon v. Wainwright*[22] firmly estab-

15. *Id.* at 18.
16. *Id.* at 17.
17. *Id.* at 19.
18. 360 U.S. 252 (1959).
19. *Id.* at 258.
20. 365 U.S. 708 (1961).
21. 372 U.S. 477 (1963). The Court in *Lane* held that the State must provide transcripts for *coram nobis* proceedings for indigents in habeas corpus actions.
22. 372 U.S. 335 (1963). The holding by the Court reversed *Betts v. Brady*, 316 U.S. 455 (1942), that a state's failure to furnish counsel to indigents accused of a crime is not necessarily a deprivation of due process.

lished the principle that wealth and the ability to pay a fee are unacceptable criteria for not hearing an appeal. Denial of access to any level of the criminal courts for indigence was found to be an invidious discrimination much the same as race or religion, and prohibited by the equal protection clause.[23] Although all of the decisions dealt with criminal proceedings, the language of the Court, particularly in *Griffin*,[24] does not appear to be limited only to criminal cases. Nevertheless, prior to *Boddie* the language of the Court was applied only to criminal cases.

B. *Access to the Courts in Civil Proceedings*

Traditionally, access to the civil courts has been predicated on the payment of specified costs and fees.[25] Official charges such as filing fees at trial and on appeal are costs to pay for the operation of the court system. These charges, assessed against the individual litigant, go toward salaries and maintenance of the physical plant of the courts. Costs for the services of independent third parties such as witnesses, printers and stenographers are termed auxiliary or associate litigation costs. Again these costs are paid by the litigant receiving the services. Another category of costs is the attorney fees and expenses. Finally, some proceedings necessitate surety costs either as bonds or deposits. These costs are incurred in creditor's suits for collateral, housing evictions, preliminary injunctions and appeals. Although these costs constituted a financial barrier to the adjudication and enforcement of indigents rights, the first access cases did not arise from these preconditions to litigation.

The great bulk of the early civil cases dealing with access to the courts involved a defendant's right to be heard at trial in defense of a property right.[26] Typical of these first decisions was *Windsor v. McVeigh*,[27] where the Supreme Court reviewed the confiscation of property of the defendant which stemmed from his activity in the Confederacy. The Court ruled that since the defendant was not heard due to lack of notice of the proceedings, he was

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23. Griffin v. Illinois, 351 U.S. 12, 17 (1956).

24. The Court stated:

> There is no meaningful distinction between a rule which would deny the right to defend themselves at trial court and which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay costs in advance.

Id. at 18. The Court also cautioned: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

25. Goodplaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970) [hereinafter cited as Goodplaster]; *see also* Blood, *Injunction Bonds: Equal Protection for the Indigent*, 11 S. TEX. L.J. 16 (1969).

26. The Court in *Boddie* cited eighteen cases to illustrate due process as applied to access. 401 U.S. at 377 n.3. Only one, *Armstrong v. Manzo*, 380 U.S. 545 (1965) involved a real property interest.

27. 93 U.S. 274 (1876).

not afforded due process of law. The Court emphasized the right to be heard: "A sentence of a court pronounced against a party without hearing him, or giving him opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."[28] The language of the court is clearly broader than needed to require notice to a defendant of a threat against his property.

None of these early access cases confronted the problem of a party denied access to the courts because the litigant was unable to pay filing cost or other fees.[29] A partial explanation may have been that a defendant, in most instances, needed only to appear in court to defend his property. Actions by indigent plaintiffs apparently never were instigated before the advent of free legal services. The indigent plaintiff was without an alternative to extra-legal settlement of his claim of rights.

As noted above[30] eviction proceedings require that the defendant-tenant meet a financial precondition before he may defend his claim to occupancy. In *State v. Sanks*,[31] the Supreme Court of Georgia reviewed a statutory provision for a fee to defend.[32] The statute prohibited the filing of an answer to an eviction without the posting of a bond in an amount twice the rent. The court held that the statute was valid. Relying on the United States Supreme Court case of *Jones v. Union Guarno*,[33] the Georgia court declared:

> The Fourteenth Amendment to the Federal Constitution does not prevent a state from prescribing a reasonable and appropriate condition precedent to bringing a suit of a specific kind or class so long as the basis of the distinction is real and the condition imposed has a reasonable relationship to a legitimate purpose.[34]

However, in citing *Union Guarno* as authority for its decision, the Georgia court did not consider possible distinctions. The condition precedent in *Union Guarno* was that no suit for damages from results of the use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients. The Supreme Court noted, "The act [requiring analysis] does not deprive the purchaser of any right or cause of action. On the contrary, it gives

28. *Id.* at 277.
29. *See* text accompanying note 26 *supra.*
30. *See* Goodplaster, note 25 *supra.*
31. 225 Ga. 88, 166 S.E.2d 19 (1969); *cf.* Harrington v. Harrington, 269 A.2d 310 (Me. 1970).
32. GA. CODE ANN. § 61-301-02 (1966).
33. 264 U.S. 171 (1923).
34. *Id.* at 181.

additional rights and remedies. . . ."[35] The effect of the Georgia statute requiring filing fees for the indigent who was without the amount required was more than limitation—it was total exclusion. In addition, the litigant in *Union Guarno* supposedly effected adversely was the plaintiff. The Georgia court was applying the rule of *Union Guarno* to an indigent defendants. The Georgia Supreme Court ignored the language of the United States Supreme Court in *Windsor v. McVeigh*[36] regarding a defendant's right to be heard in defense of his property.

Sanks went on appeal to the United States Supreme Court but was dismissed when the state legislature amended the statute. The Supreme Court had previously been asked to review this Georgia law but refused in *Williams v. Shaffer*.[37] The *Williams* case is noteworthy because of the lengthy dissent to the majority's denial of certiorari because of mootness. Mr. Justice Douglas applied the rationale of *Griffin v. Illinois*[38] to the merits of the case and concluded that a civil defendant cannot be deprived of a hearing on the merits in a dispossessory proceeding solely because of his inability to post the defense bond.[39]

The evolution in criminal due process and equal protection requirements began to have an impact upon the conduct of civil proceedings. Prior to *Griffin* there were no noteworthy cases challenging the financial barrier to access to civil courts confronting indignent plaintiffs and certain indignent defendants.[40] Justice Douglas' dissent provided a basis for future attempts to secure free access. Illustrative of this trend toward broadening access to civil courts was *Jeffrey v. Jeffrey*,[41] a case with substantially the same facts as *Boddie*. The indigent plaintiff petitioned the court for a divorce and attempted to locate her husband to serve the summons. Unsuccessful in attempting service, plaintiff obtained an order directing payment of publication expenses by the city. The city of New York asked that the order be withdrawn when it was determined that the publication cost would be three hundred dollars. The Supreme Court refused to withdraw the order. The court accepted the plaintiff's argument that the fourteenth amendment equal protection clause does not differentiate between civil and criminal litigants[42] and applied the reasoning of the Supreme Court

35. *Id.* at 180.
36. 93 U.S. 274, 277 (1876). *See* text accompanying note 28 *supra.*
37. 385 U.S. 1037 (1967) (denying certiorari to 222 Ga. 334, 149 S.E.2d 668 (1966), (Douglas, J., dissenting).
38. 351 U.S. 12 (1956).
39. Justice Douglas expresses a position very close to that which the Court adopted five years later in *Lindsey v. Normet,* 92 S. Ct. 862 (1972). *See* text accompanying note 174 *infra.*
40. *See* cases cited at note 31 *supra.*
41. 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968).
42. Frank and Munro, *The Original Understanding of Equal Protection of the Laws,* 50 COL. L. REV. 131, 141, 167-68 (1950).

in *Griffin*.[43] The court concluded that preventing the plaintiff from receiving a divorce because of the publication costs would be invidious discrimination and that the indigent petitioner could not be denied access to the divorce court because of her poverty without violating the fourteenth amendment.[44]

The holding of *Jeffrey* was not widely accepted thus necessitating the appeal of *Boddie v. Connecticut*. It is submitted that the state courts and lower federal courts did not wish to expand the due process and equal protection requirements of criminal cases to civil proceedings before the Supreme Court took such action. It remains clear, however, that despite the limited acceptance of *Griffin* and its progeny[45] in civil actions, these cases were the catalyst for attempts to expand free access in the civil courts.

III. The Challenge for Free Access to the Civil Courts as a Matter of Right for Indigents

A. *Boddie v. Connecticut in the Federal District Court*

The federal district court's decision in *Boddie*[46] predated the New York Supreme Court's decision in *Jeffrey v. Jeffrey* by several months. Procedurally the cases were quite distinct.[47] This was due in part to *Boddie's* greater emphasis on the wider goal of law reform for a whole class of persons, rather than a simple remedy for a single litigant.[48] The plaintiffs in *Boddie* attempted to file for their divorces without paying the statutory fees.[49] The filing forms accompanied by motions to waive the fees were rejected by the clerk of the Superior Court of New Haven County. After exhausting all other extra-legal means of avoiding the fees, the plaintiffs sought relief[50] in the form of a declaratory judgment in the district court. The case was brought to a three judge panel to expedite review to the Supreme Court.[51]

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43. Jeffrey v. Jeffrey, 58 Misc. 2d 1045, 1050, 296 N.Y.S.2d 74, 84 (Sup. Ct. 1968).
44. *Id.*
45. *See* text accompanying notes 18-22 *supra*.
46. 286 F. Supp. 968 (D. Conn. 1968).
47. Jeffrey v. Jeffrey, 58 Misc. 2d 1045, 1046, 296 N.Y.S.2d 74, 75 (Sup. Ct. 1968).
48. LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 492 (1971) [hereinafter cited as LaFrance].
49. CONN. GEN. STAT. ANN. § 52-259-61 (Supp. 1971).
50. La France at 501.
51. 28 U.S.C. § 2281 (1964) provides for a three judge district court panel to hear suits seeking injunctive relief against unconstitutional state

The argument by the appellants in the district court consisted of an attack on the constitutionality of the ailing statutes predicated on the equal protection clause as applied in *Griffin* and the due process clause as utilized in *NAACP v. Button*.[52] The *Button* decision involved the application of a Virginia statute[53] restricting persons and organizations from soliciting legal business for any attorney where that organization or person had no right at stake in the litigation. The Supreme Court held that the statute as construed and applied to bar law reform efforts by the NAACP violated first amendment[54] and fourteenth amendment rights. The Court reasoned that the solicitation was a form of political expression protected by the first amendment.[55] *Button* was utilized by the appellants in *Boddie* to establish the right to be heard based on the similar right to petition for redress.[56]

Although the district court in *Boddie* found "a classification of prospective civil suitors between those able to afford the court costs and those unable to afford them,"[57] the district court denied the relief sought. The court rejected the applicability of *Griffin*[58] in civil proceedings because of "the differences between the right to freedom from capital punishment or imprisonment and the right to access to civil courts to adjust claims."[59] The district court did not speak to the due process approach nor make any reference to *Button*.

B. *Boddie v. Connecticut in the United States Supreme Court*

Two months after the federal district court delivered its decision of July, 1968, a direct appeal was filed to the Supreme Court.[60] After argument in December, 1969, and March, 1970, the Court asked for reargument before the "new" Court[61] in November, 1970, and March, 1971.

The essential position of the petitioners did not change substantially from the one taken in the lower court. The contention

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action. 28 U.S.C. § 1253 (1970) provides for direct appeal of decisions of a panel such as the one convened under 28 U.S.C. § 2281.

52. 371 U.S. 415 (1963).

53. VA. CODE ANN. §§ 54-74, -78-79 (1958).

54. U.S. CONST. amend. I provides Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for redress of grievances.

55. NAACP v. Button, 371 U.S. 415, 429 (1963).

56. *See* LaFrance at 510.

57. 286 F. Supp. 968, 972 (D. Conn. 1968).

58. *But cf.* Harper v. Virginia, 383 U.S. 663 (1966) (striking down local poll taxes).

59. 286 F. Supp. 968, 972 (D. Conn. 1968).

60. 28 U.S.C. § 1253 (1970).

61. Chief Justice Warren was replaced by Chief Justice Burger and Mr. Justice Fortas was replaced by Mr. Justice Blackmun, subsequent to the original argument of the case.

remained that the fees as applied to plaintiffs constituted an economic discrimination violative of the equal protection clause.[62] The appellants did, however, put greater emphasis on the adoption of wealth as a "suspect criteria" for classification of litigants.[63] Appellants relied on *Shapiro v. Thompson*[64] for support. In *Shapiro* the Court found that the residency waiting period requirement for welfare eligibility created two classes of needy residents. The only factor distinguishing one group from the other was the term of residence. The Court held the distinction unacceptable and the classification violative of fifth amendment due process requirements.[65]

Why the appellants utilized *Shapiro* to establish wealth as a suspect criterion is not clear. The Court at no point in the *Shapiro* case explicitly stated this proposition. Justice Harlan, in dissent, noted the classification:

> The criterion of wealth was added to the list of suspects as an alternative justification for the rationale in *Harper v. Virginia Bd. of Elec.* [cite omitted]. Today the list apparently has been further enlarged to include classifications based upon recent interstate movement.[66]

Mr. Justice Harlan refused to accept either wealth or term of residency as a suspect criterion.[67]

Although *Shapiro* is not conclusive as establishing wealth as a suspect criterion for classification, it remains an important case for indigent litigants. The Court in striking down welfare residency requirements extended the parameters of that group of rights fundamental enough to require judicial scrutiny when impaired. Even Justice Harlan, dissenting in *Shapiro*, agreed that "the right to travel is a fundamental right which for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment."[68] Thus, indigent plaintiffs could maintain that if the scope of fundamental rights was wide enough to encompass the right to travel interstate, then the right to be heard in court should be within these protected fundamental rights. This possible proposition was not argued by the appellants.[69]

62. *See* LaFrance at 511.
63. *Id.* at 512.
64. 394 U.S. 618 (1969).
65. *Id.* at 631-32.
66. 394 U.S. 618, 658 (1969) (dissenting opinion).
67. *Id.* at 634-38.
68. *Id.* at 671.
69. *See* LaFrance at 511.

C. *Boddie v. Connecticut—the Supreme Court Opinions*

1. *The Holding of the Court*

Justice Harlan, writing for the majority, stated that the due process clause of the fourteenth amendment prohibited application of the Connecticut statutes requiring a filing fee and costs for service of process. The Court held that such application denied the appellants a hearing on their divorces, not for insufficiency in the merits of their petitions but solely on their inability to pay the required fees. Support for the holding that this violated due process was offered in the form of the prior "access" cases dealing with procedural due process with regard to notice.[70] Application of the due process standard was based on three principles. First, marriage is a fundamental human relationship[71] occupying a basic position in society's hierarchy of values.[72] Second, the state in this area of conflict resolution has a complete monopoly and is thus "the only forum effectively empowered to settle their disputes."[73] Third, the claimed right to dissolution of their marriages is a protected right, interference in the exercise of which is constitutionally prohibited.[74]

In concluding the opinion, Justice Harlan placed great emphasis on limiting the holding to the facts.

> We go no further than necessary to dispose of the case before us, a case where bona fides of both the appellant's indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that exercise may not be placed beyond the reach of any individual, for as already noted, in the case before us this right is preconditioned to the adjustment of a fundamental human relationship.[75]

In *Boddie*, the Court delivered an interpretation of the due process clause that is of great benefit for indigent litigants. This result is emphasized by the explicit intent of the Court to decide the issue of access as the Court itself narrowly framed it in the context of the specific fact situation. However, the concluding language does not expressly foreclose the possibility that other circumstances may exist where exercise of the right to access may not be limited. Although the holding may be limited by the conclusion, the underlying reasoning cannot be pared down and re-

70. *See* text accompanying note 27 *supra.*
71. Boddie v. Connecticut, 701 U.S. 371, 383 (1971).
72. *Id.* at 374.
73. *Id.*
74. *Id.* at 380-81. Justice Harlan suggested as protected rights the ones of religious freedom, free speech and freedom of assembly enumerated in the first amendment. *See* note 54 *supra.*
75. 401 U.S. 371, 382-83 (1971).

stricted so easily. Thus, the decision poses for analysis the proposition that the rationale of *Boddie* goes beyond divorce and "cannot and should not be limited to either its facts or its language."[76] A determination of the validity of this proposition requires that the language and reasoning of the Court be examined and that the separate opinions be contrasted.

2. *Analysis of the Majority's Due Process Approach*

In words not unlike those used by the Commission on Civil Disorders,[77] the majority opened the opinion by emphasizing the necessity for a legal system to resolve conflicts in an orderly, predictable manner. Justice Harlan explained:

> Without such a legal system, social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievement without the anxieties that would beset them in a disorganized society.[78]

The Court continued, constructing a theoretical framework by pointing out that the courts and other quasi official bodies are the ultimate sources of conflict resolution. This fact necessitates adoption of a due process concept in the fifth and fourteenth amendments.

Mr. Justice Harlan noted the unique nature of the claim to be heard in *Boddie*. The litigants were not defendants and the controversy did not concern property rights. The Court reasoned that other claims of rights were capable of settlement without resort to the judicial process. In these instances the state does not deny due process in refusing access to the courts because the Court felt "effective alternatives for the adjustment of differences remain."[79] Conversely, if the state were to bar access where there exists no effective means of alternative adjustment, the due process clause would invalidate the state action. The Court asserted this proposition without offering specific authority for support.

Violation of the above due process standard requires a finding of two facts. First, the interest litigated must be within those rights protected by the guarantees of the fourteenth amendment.[80]

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76. Meltzer v. LeCraw, 402 U.S. 954, 956 (1971) (Black, J., dissenting from a denial of certiorari).
77. *See*, authority cited note 2 *supra* at 5-11.
78. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).
79. *Id.* at 376.
80. *Id.* at 379.

Second, the interest threatened must not be capable of effective adjustment by private structuring and repair.[81] For Justice Harlan and the Court, these two elements are all that is necessary to find a denial of the right to be heard protected by the due process clause. The Court found these two elements present in *Boddie*.[82]

Authority offered as support for the contention that the right to a divorce is within the group of rights and interests protected by the fourteenth amendment is quite sparse. Citing three prior Supreme Court decisions,[83] the Court asserted that marriage involves interests of basic importance in our society.[84] The Court interpreted these cases to allow for the right to dissove marriages and remarry because there is undisputedly the right to marry.[85] This conclusion tacitly dismisses the state's argument that divorces should be discouraged and not be as favored as marriage in the operation of law.[86]

The opinion incorporates the notion of the right to divorce into the general concept of the right to be heard. This was attempted by likening the plaintiffs to defendants called into court to defend a property interest, because the plaintiffs in *Boddie* have no alternative means of adjudicating their rights. Resort to the judicial process for plaintiffs like Gladys Boddie "is not the paramount dispute settlement technique but, in fact, the only available one."[87] The analogy of defendants called to defend an interest and plaintiffs in a divorce is not a true one. A defendant in a civil suit has the opportunity to settle the controversy out of court. The plaintiff petitioning for a divorce cannot secure a divorce without resort to the court from start to finish. For parties seeking to separate, terminate their marriage and be free to marry again there is no out of court settlement.[88]

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81. *Id.* at 376.

82. *Id.* at 382-83.

83. Loving v. Virginia, 388 U.S. 1, 12 (1967). "The freedom to marry has long been recognized as one of the vital personal rights to the orderly pursuit of happiness by free men"; Skinner v. Oklahoma, *ex rel.* Williamson, 316 U.S. 535, 541 (1942). "We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). "Without doubt it [fourteenth amendment] denotes not merely freedom from bodily constraint but also the right of the individual to contract, to engage in any common occupation of life, to acquire knowledge, to marry . . . and generally to enjoy privileges long recognized at common law as essential to orderly pursuit of happiness by free men."

84. 401 U.S. 371, 376 (1971).

85. This line of reasoning suggests that an indigent could secure waiver of marriage license fees.

86. 286 F. Supp. 968, 974 (D. Conn. 1968) (District Court refers to Government argument at note 6).

87. 401 U.S. 371, 376-77 (1971).

88. *See* Note, *Supreme Court 1970 Term*, 85 HARV. L. REV. 3 (1971) "This rationale is unpersuasive, however, for [civil] defendants can and do settle law suits against them." *Id.* at 107.

Mr. Justice Harlan distilled from the early access cases and the history of due process generally a due process test slightly different from the one suggested earlier[89] in the opinion.

> [A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.[90]

This standard is narrower because it adds the finding of no state interest of overriding significance before due process will invalidate state action. In *Boddie*, the purposes of raising revenue and discouraging frivolous claims were dismissed[91] on the rationale of *Griffin*.[92]

Thus the restatement of the due process standard did not effectively alter the central requirement of finding a protected right threatened and a monopoly by the state for effective resolution of the particular conflict. As noted above, the claimed right to a dissolution of their marriages was found to be such a protected interest.[93] The remaining element required for application of the due process standard was a finding of exclusive state control of effective settlement. The Court had no difficulty with this determination:

> Even where all substantive requirements are concededly met, we know of no instance where two consenting adults, may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without the state judicial machinery.[94]

The circumstances in *Boddie* evidence the two requirements necessary for application of the due process test suggested by Justice Harlan—that the interest litigated is a right protected and that there is no effective alternative to the courts. However, mild criticism can be leveled at the distinct dearth of authority for some of the initial premises concerning the right to divorce[95] and importance of exclusive state control.[96] However, this is not the cause for the split in the Court and the separate opinions. Rather the attempt to limit the holding to only divorce in like circum-

89. *See* text accompanying notes 79-82 *supra.*
90. 401 U.S. 371, 377 (1971).
91. *Id.* at 381-82.
92. 351 U.S. 12 (1956).
93. *See* text accompanying note 85 *supra.*
94. 401 U.S. 371, 376 (1971).
95. *Id.* at 381 n.8. *See also* text accompanying note 79 *supra.*
96. *Id.* at 375-76.

stances and the use of the due process clause to the exclusion of the equal protection clause generated the concurring opinions.

3. *The Equal Protection Approach*

Mr. Justice Douglas did not accept due process as the sole basis for a determination that the statutes requiring the fees were unconstitutional. Concurring, Justice Douglas argued that the case ought to be decided upon the principles developed in the line of cases marked by *Griffin v. Illinois*.[97] He further stated that *Boddie* was comparable to *Smith v. Bennett*.[98] There the Court held that compelling indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalid under the equal protection clause. Justice Douglas reiterated his agreement[99] with the theory that there should be no distinction between civil and criminal proceedings in the application of the equal protection clause.[100]

Although Justice Douglas did not think the majority was incorrect in applying the due process clause, he felt it was unwise to employ only the due process protection. Justice Douglas expressed his distaste for what he deemed a subjective standard by noting that "the Due Process Clause on which the Court relies has proven very elastic in the hands of judges."[101] Justice Douglas offered as examples of this subjectivity *Lochner v. New York*,[102] *Coppage v. Kansas*[103] and *Adkins v. Children's Hospital*[104] where he believed the "idiosyncrasies" of the individual judges prevailed. In each of the cases the question was whether the claimed right was within that group of rights and interests protected by the fifth and fourteenth amendments.

Justice Douglas alternatively urged acceptance of the appellants' proposition that wealth become a suspect criterion for classification. The Court had already designated race,[105] religion,[106] caste or class[107] suspect criteria, and Justice Douglas argued that the holdings of *Griffin, Burns,* and *Douglas v. California*[108] added wealth to this list. In the latter case the Court held that "[i]n either case [*Griffin* or *Douglas*] the evil is the same discrimination

97. *Id.* at 383.
98. 365 U.S. 708 (1961); *see also* text accompanying note 20 *supra.*
99. *See* text accompanying note 38 *supra.*
100. Frank and Munro, *The Original Understanding of Equal Protection of the Laws,* 50 COL. L. REV. 131 (1950).
101. 401 U.S. 371, 384 (1971).
102. 198 U.S. 45 (1905).
103. 236 U.S. 1 (1915).
104. 261 U.S. 525 (1923).
105. Strauder v. West Virginia, 100 U.S. 303 (1878).
106. Sherbert v. Verner, 374 U.S. 398 (1963).
107. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
108. 372 U.S. 353, 355 (1963).

against the indigent."[109] Justice Douglas found that the law as applied in Connecticut did not grant a petition for divorce on the merits alone but also on the ability to pay a fee. The obtaining of a hearing for a divorce necessitated only the latter. For Justice Douglas the granting or denying of a divorce on the ability to pay the fee was invidious discrimination barred by the equal protection clause. The dividing of petitioners into two groups, one successful and one unsuccessful, not on the merits but on the basis of their ability to pay the fees was a classification on the suspect criterion of wealth.

The implication of finding wealth a suspect criterion would be sweeping. Every abridgment of a right or interest because of the inability to meet a financial obligation, either fees or costs, would be immediately brought under the scrutiny of the court.[110] In addition, a classification based on a suspect criterion must overcome the presumption that the classification is unconstitutional.[111] Adoption of wealth as a suspect criterion would have application well beyond divorce. It would bar all fee requirements that preempt access to the judicial process in its application to indigents.

4. *Integrated Due Process and Equal Protection Approach*

Justice Brennan, in his concurring opinion, occupied the middle ground between the exclusively due process and exclusively equal protection approaches.[112] There is no disagreement between Justices Brennan and Douglas in applying the equal protection clause. Justice Brennan explained:

> The rationale of *Griffin* covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under the law to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to the plaintiffs altogether. Where money determines not merely "the kind of trial a man gets" *Griffin v. Illinois, supra,* 351 U.S. at 19, but whether he gets into court at all the great principle of equal protection becomes a mockery.[113]

Whereas Justice Brennan's position was indistinguishable from Justice Douglas' on equal protection, he was not in complete accord with the limits suggested by the majority in utilization of due

109. *Id.* at 355.
110. Loving v. Virginia, 388 U.S. 1 (1967).
111. *Id.*
112. 401 U.S. 371, 386-89 (1971).
113. *Id.* at 388-89.

process. Justice Brennan could discern no constitutional distinction between appellant's attempt to enforce a statutory right and any other right. He stated that "[t]he right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis."[114] Although Justice Brennan did not explicitly offer a reason why every proceeding entertained by courts might be included, one rationale is apparent.[115] It is submitted that every person claiming a right or interest enjoys that right or interest because it is enforceable in a court of law. Observance of the right or interest by others is largely a result of the right being enforceable. As the majority suggests, many claims of right are resolved without resort to judicial process but by employing "effective alternatives for the adjustment of differences."[116] The majority contended that the indigent plaintiff who was unable to go to court was not denied due process because effective alternatives exist for causes of action other than divorce. Difficulty arises with this theory in practice.

A paradox exists in the relationship between judicial and extra judicial resolution of conflict. When access to the judicial process is available, the effective alternative means are viable as a method of *effectively* resolving conflict. Paradoxically, when access is barred and the extra-judicial means of resolution are needed, the alternative means are no longer effective. Removal of the possibility of taking the dispute to court because of an inability to pay filing fees, leaves the indigent plaintiff without any leverage with which to negotiate. The "effective" alternative becomes dysfunctional if the indigent has no judicial alternative to the offer of his adversary. The indigent must take what is offered in accounting for his claim or take nothing. Only when the right to be heard in some way at some time extends to all proceedings entertained by courts will extra-judicial means be effective alternatives to settlement of disputes involving indigents.

Thus, since effective alternative means are non-existent, the monopoly condition would exist and the due process clause would be invoked. This pragmatic view would support the conclusion of Justice Brennan that all claims ought to be heard in some fashion.

Despite the concurring opinions of Justices Douglas and Brennan, the majority of the Court did not even comment on the equal protection rationale. It is submitted that the Court may have done tacitly what Justice Douglas did expressly. Justice Douglas recog-

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114. *Id.* at 387-88.

115. *See* NAACP v. Button, 371 U.S. 415 (1963). "Under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *Id.* at 429-30.

116. 401 U.S. 371, 376 (1971).

nized due process as being applicable but that equal protection, also applicable, was the better approach. Conversely, the Court may have accepted the applicability tacitly by not commenting against the concurring opinions but by adopting the due process approach as being more suitable. Justice Brennan's acceptance and application of both is more flexible and balanced in approaching *Boddie* and future controversies.

5. *The First Amendment Approach to Access*

The appellants in *Boddie* did not claim the right that was afforded them by the Court's decision. Counsel for the petitioners believed that the indigent plaintiffs did not have a right to a divorce as such. Rather, appellants claimed that they had a first amendment right to petition for redress.[117] This "basic liberty" found in the Bill of Rights was hoped to be more welcome to the Court than the novel claim of a right to a divorce. Accepting access to the judicial process itself as a protected right would achieve a result as broad as that suggested by Justice Brennan. Any right or interest would be relieved of the burden of facing the subjective test of being found a fundamental protected right. Access to the courts, as the right to be protected would be secured by hearing the indigent's claim in every instance. The elimination of the subjective test would also allay the objections of Justice Douglas.[118]

In reviewing the theoretical framework[119] offered by the Court it is difficult to discern why the majority passed over the enumerated right of the first amendment in favor of the right to dissolve one's marriage.[120] Certainly, the former fits more readily with the examples of protected rights.[121] The reason must be akin to the rationale of Justice Black in a subsequent decision. Justice Black explained the action by suggesting that the Court wished to proceed "slowly step-by-step so that the country will have time to absorb its [*Boddie's*] full import."[122]

117. *See* LaFrance. "Even though the appellants had no constitutional right to divorce, they had a right to seek to petition for divorce. The right to petition was itself constitutionally assured, quite apart from whether the relief sought was constitutionally guaranteed." *Id.* at 513.

118. *See* text accompanying note 101 *supra.*

119. 401 U.S. 371, 375-76 (1971).

120. Goodplaster, *The Integration of Equal Protection, Due Process Standards and the Indigent's Right to Free Access to the Courts,* 56 IOWA L. REV. 223, 240-41 (1970). Justice Harlan has expressed greater willingness to afford due process protection to "basic liberties" rather than "fundamental rights," a term associated with equal protection.

121. 401 U.S. 371, 379-80 (1971).

122. Meltzer v. LeCraw, 402 U.S. 954, 956 (1971) (Black, J., dissenting from a denial of certiorari).

IV. The Developing Challenge for Free Access to the Courts as a Matter of Right

Boddie v. Connecticut guarantees clear access to the judicial process for a hearing on the petition of many indigent plaintiffs. If this were the only benefit derived from the decision it would be a limited achievement in terms of a test case to effect law reform. Such a limited affect has not been evident thus far. *Boddie* has become both an alternative rationale for other cases involving access and a generator of new challenges. The remainder of this Note will review and assess the developing challenge for free access. Four basic civil fee and cost barriers to the judicial process are considered in light of recent cases. These financial preconditions to litigation are: trial filing fees and costs; trial surety costs; appellate filing fees and costs; and appellate surety costs.

A. *Trial Filing Fees and Costs*

Typical of challenges against filing fees have been attempts to have free access to the courts for filing of petitions in bankruptcy. Subsequent to *Boddie* the Supreme Court refused to review[123] an unsuccessful attack on such a filing fee in *In re Garland.*[124] *Garland* was among eight access cases considered by the Court for review.[125] Two of the cases were reversed and remanded,[126] and review was denied to five appeals.[127] The Court agreed to hear only *Lindsey v. Normet.*[128] The general denial of certiorari elicited a lengthy and vigorous dissent from Justice Black who argued that all eight of the cases ought to be heard in light of *Boddie* because that decision should not be limited to its facts or the concluding language of the Court.[129] Justice Black urged that tort claims and bankruptcy relief be accepted as fundamental to an orderly society and at least as important as the right to divorce.[130] Justice Black concluded that "[t]he civil courts of the United States belong to the people of this country and that no person can be denied access to these courts, either for trial or an appeal, because he cannot pay

123. *Id.*
124. 428 F.2d 1185 (1st Cir. 1970).
125. 402 U.S. 954 (1971).
126. Frederick v. Schwartz, 296 F. Supp. 1321 (D. Conn. 1969); Sloatman v. Gibbons, 448 P.2d 124 (1968).
127. *In re* Garland, 428 F.2d 1185 (1st Cir. 1970); Beverly v. Scotland Urban Enterprises, 255 La. 346, 230 So. 2d 837 (1971); Bourbeau v. Lancaster, Super. Ct., Conn. (1971); Carter v. Kaufman, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1971); Meltzer v. LeCraw, 225 Ga. 91, 166 S.E.2d 88 (1969).
128. 402 U.S. 941 (1971).
129. 402 U.S. 954, 957 n.2 (1971). Justice Black still reserved some doubts about the rationale of *Boddie* but accepted it as law. "I would either overrule *Boddie* at once or extend the benefits of government paid costs to other civil litigants whose interests are at least as important [as the right to divorce] to an orderly society." *Id.* at 958.
130. *Id.*

a fee, finance a bond, risk a penalty or afford to hire an attorney."[131]

In *Garland* the plaintiffs sought a waiver of the filing fees for a petition in bankruptcy. The plaintiffs contended that refusal to give indigents a bankruptcy discharge without payment of fees was a denial of due process.[132] The First Circuit Court refused to adopt this reasoning, arguing that bankruptcy was not a right but a privilege and that reasonable conditions could be attached to the granting of such privileges.[133] The court in *Garland* also relied on the fact that the fifty dollar filing fee was reasonably related to the service because it paid for the service.[134] This type of fee "as a mechanism of resource allocation or cost recoupment . . . was offered and rejected in *Griffin v. Illinois.*"[135] The decision in *Garland* stands for the proposition that the privilege of a discharge in bankruptcy can be denied without violation of due process by application of a fee requirement. Federal courts in the Second,[136] Ninth[137] and Tenth Circuits[138] confronted with the same issues and facts have reached the opposite conclusion.

In re Kras[139] followed both the district court's decision in *Garland* and the Supreme Court's denial of certiorari. The district court in *Kras* accepted the explanation offered by Justice Black that such denial resulted from the Court's desire to proceed "slowly step by step."[140] The Court rejected completely the reasoning of the First Circuit Court of Appeals in *Garland* and added equal protection to due process as a reason for waiving the fees as a matter of right. The Court concluded:

> This court can only agree that the proper interpretation of *Boddie* requires that as applied to petitioners herein, the statutory requirements of prepayment of a filing fee to obtain discharge in bankruptcy violates his Fifth Amendment right of due process including equal protection.[141]

The basic proposition, separating the First Circuit from the

131. *Id.*
132. 428 F.2d 1185, 1187 (1st Cir. 1970); *applying,* 11 U.S.C.A. § 24, Bankruptcy Act § 6 (1966).
133. 428 F.2d 1185, 1188 (1st Cir. 1970).
134. *See In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971). The court in *Kras* noted that filing fees did not approximate operating costs and that in 1970 there was a $4,531,466. deficit. *Id.* at 1214.
135. Boddie v. Connecticut, 401 U.S. 371, 382 (1971).
136. *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971).
137. *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971).
138. *In re* Smith, 322 F. Supp. 1082 (D. Colo. 1971).
139. 331 F. Supp. 1207 (E.D.N.Y. 1971).
140. *Id.* at 1211.
141. *Id.* at 1212.

other circuits noted, it that court's insistence that bankruptcy is a privilege not a right.[142] The court, in *Garland*, concluded that privileges can be granted subject to a fee requirement. The district court in *In re Smith*[143] dismissed this reasoning asserting that the distinction between right and privilege was irrelevant.[144] The court assessed the importance of the interest of the petitioner without regard to right-privilege distinctions. The court explained that "[w]e disagree that the interest of an assetless person is necessarily less important than one who has $50 for a filing fee and few, or no, assets to be divided among creditors."[145] This is essentially the reasoning of Justice Brennan in *Boddie*, that all proceedings entertained by courts must be heard in some fashion.

A decision of the Supreme Court is needed to resolve this split of authority within the federal system. It is submitted that the denial of review to *Garland* and the granting of certiorari to *Kras* possibly forecasts the Supreme Court's decision in *Kras*. The Court's action in granting the appeal could indicate a willingness to correct *Kras* while allowing the holding in *Garland* to stand.[146] If this were true a reversal of *Kras* could be expected which would impede the process of indigents toward free access.

B. *Injunction Bonds*

An injunction will be issued under proper conditions to restrain such actions as the sale of personal property to satisfy a landlord's lien or the recovery of possession of property under forcible entry and detainer.[147] One of the conditions for the injunctive relief is the posting of the requisite injunction bond prior to the granting of the writ.[148] In many instances the indigent is unable to post any security and a judicial determination of his property right is precluded by this financial requirement.

As noted above,[149] the Supreme Court twice refused to hear cases concerning the constitutionality of forcible entry and detainer statutes in *Williams v. Shaffer* and *State v. Sanks*. Both cases were determined to be mooted, by eviction in the former and a statutory amendment in the latter. In *Williams* Justice Douglas and Chief

142. *In re* Garland, 428 F.2d 1185, 1187 (1st Cir. 1970).
143. 323 F. Supp. 1082 (D. Colo. 1971).
144. *Id.* at 1090.
145. *Id.*
146. *See* United States v. Carver, 260 U.S. 482, 490 (1923). Decisions not to grant certiorari are not to be taken as decisions on the merits.
147. Blood, *Injunction Bonds: Equal Protection for the Indigent*, 11 S. TEX. L.J. 16 (1969).
148. *See* FLA. STAT. c. 64, § 6403 (1955); MD. R. CIV. P. BB 75; ORE. REV. STAT. § 19.040(1) (1969) provides in part: "The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on appeal. . . ."
149. *See* text accompanying notes 31, 37 *supra*.

Justice Warren wished to review the law[150] because the statute "apparently violates the Equal Protection Clause by patently discriminating against the poor."[151] Other members of the Court may have agreed with the position of Justice Douglas on constitutionality but also recognized mootness as cause not to hear the appeal.

In dismissing the appeal in *Sanks*, Justice Harlan spoke approvingly of the changes in the Georgia law concerning forcible entry and detainer.[152] The changes in the statutory scheme eliminated the petitioners' objections to the statutes and alleviated the financial barrier of the initial bond in order to defend. The tenant now merely answers the execution affidavit either orally or in writing. If litigation cannot be completed within a month of execution of the landlord's affidavit, the tenant may retain possession by paying into court all rent as it becomes due.[153]

Although concerned with the double appeal bond aspects of the Oregon forcible entry and detainer statute[154] which required the defendant to post bond in an amount equal to *twice* the value of the property in question, the Supreme Court decision in *Lindsey v. Normet*[155] applies to some extent to injunction bonds at trial level. The Court stated that ". . . [a] State may properly take steps to insure that the appellant post adequate security before an appeal to preserve the property at issue."[156] Application of this reasoning at the trial level would mean assurance that rent as it accrues will not be lost. The Georgia statute does this by having the tenant pay into court.

In *Lindsey*, the Supreme Court applied the rationale of *Griffin* to strike down the double bond provisions of the forcible entry and detainer statute.[157] The double bond requirement did not relate reasonably to the merits of the appeal or the damage suffered by the landlord. It is submitted that if the appeal bond must bear some reasonable relationship to the possible damages then the initial bond must also. This would apply to the landlord's lien as well. The tenant there ought to be allowed to answer in a manner like the scheme proposed in the Georgia forcible entry and detainer statute. The bond should not foreclose access to defend but

150. GA. CODE ANN. tit. 61, §§ 301-6 (1966).
151. 385 U.S. 1037, 1041 (1967).
152. GA. CODE ANN. tit. 61, §§ 301-6 (1970).
153. GA. CODE ANN. tit. 61, §§ 303-4 (1970).
154. ORE. REV. STAT. §§ 105.105-105.160 (1969).
155. 92 S. Ct. 862 (1972).
156. *Id.* at 876.
157. *Id.*

only secure the property in question.[158] It is submitted that future appeals in the order of *Williams*, if not mooted, will be successful in light of the dismissal in *Sanks*, and the collateral holding in *Lindsey* that the only valid requirement the state may impose to defend is one which insures the preservation of the property at issue.

C. *Appellate Fees and Costs*

Indigent appellants have had some degree of success in attaining free access for appeals in civil courts. Based directly on *Boddie* the Connecticut district court in *Gatling v. Butler*[159] invalidated a fee barrier in a juvenile proceeding. The court noted:

> If it is constitutionally impossible to bar access to the courts of Connecticut by an indigent party for adjudication of her right to a divorce, a fortiori, an indigent juvenile may not be deprived of an appeal in its courts from a state's adjudication that she is a juvenile delinquent because she is financially unable to pay court fees which are required to enter an appeal.[160]

The decision of the Connecticut court does not broaden *Boddie* to any great extent, since the interest threatened in this quasi-criminal procceding is as fundamental as divorce. The reversal and remand of *Frederick v. Schwartz*[161] by the United States Supreme Court, however, does indicate *Boddie* goes beyond divorce in the area of civil appeals. In *Frederick*, the district court of Connecticut held that the requirement of a seven dollar entry fee did not violate a welfare recipient's constitutional rights to due process and equal protection.[162] The petitioners sought free access to appeal a welfare commissioner's rulings. The district court followed the reasoning of *Boddie v. Connecticut* as decided by the district court. The Supreme Court reversed and remanded for consideration in light of the decision in *Boddie*. It is submitted that this action must indicate that the *Boddie* holding does go beyond divorce and apply to other circumstances where access may not be preempted by the requirement of an appeal filing fee.

Another major cost confronting the indigents on appeal, and often forcing the appellant out of court, is the fee for transcripts of the record. In *Rowe v. Superior Court of Los Angeles County*[163] the appellant sought and received the waiver of transcript costs for an appeal of a denial in the modification of child support. How-

158. *See* text accompanying note 28 *supra*. The civil access cases dealing with procedural due process support the reasoning since they similarly involve the defense of property. *Cf.* note 181 *infra*.
159. 52 F.R.D. 389 (D. Conn. 1971).
160. *Id.* at 397.
161. 402 U.S. 386 (1971).
162. 296 F. Supp. 1321 (D. Conn. 1969).
163. 94 Cal. Rptr. 398, 484 P.2d 70 (1971).

ever, the Supreme Court of California was not concerned with the question whether indigents must be given funds by the county to pay transcript fees. Rather, the court dealt only with the inherent power of the appellate court to waive its own filing fees to accommodate indigent civil litigants.[164] This power existed in the opinion of the court.[165] Had the court decided the former question, the ability of indigents to carry appeals would have been assured. The question whether appeal costs must be waived as a matter of right was confronted and answered by District of Columbia Circuit Court in *Lee v. Habib*.[166]

The indigent in *Lee v. Habib* sought a court order to require the District of Columbia to pay for a transcript for an appeal from a suit for possession. Tracing the evolution of indigent rights in appeal procedures from *Griffin* through *Gideon* and *Douglas*, the court applied the equal protection clause to the civil proceeding as it had been utilized in criminal cases. Judge Wright, writing for the majority explained:

> It is the importance of the right [threatened] to the individual not the technical distinction between civil and criminal which should be of importance to a court in deciding what procedures are constitutionally required in each case. . . . Often the poor litigant will have more at stake in a civil case than in a criminal case.[167]

Gatling v. Butler and *Lee v. Habib* illustrate once more the problem that the courts have had defining the roles of the due process and equal protection clauses. As in *Boddie*, the judges in *Gatling* and *Habib* are in disagreement as to the means of achieving the end of access. It is submitted that it is an unrealistic and futile exercise to attempt to divorce the two clauses in the context of access.[168] The integrated approach of Justice Brennan is the better view.[169]

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164. *Id.* at 72.
165. *Id.* at 72-3.
166. 424 F.2d 891 (D.C. Cir. 1970).
167. *Id.* at 901.
168. Note, *The Demise of Right Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1456 (1968):

> A systematic review of the equal protection and due process lines of cases would, I believe, readily establish that the constitutional tests of "arbitrary classifications" are rapidly becoming indistinguishable from the constitutional test of "unreasonable regulation" under the due process clause. Indeed, it is fair to say that the two clauses have almost merged. . . . The greatest circumvention of the distinction [right from privilege] has been achieved via the equal protection clause. Under that clause it seemingly makes no difference that the threatened interest is a privilege rather than a right.

169. *See* text accompanying notes 112-15 *supra*.

D. *Appellate Bonds*

The remaining financial obstacle considered herein is the right of an indigent to appeal an adverse judgment without posting appeal bond. These bonds are required to protect the judgment of the appellee. Challenges questioning the constitutionality of these bonds have met with mixed results. The Supreme Court of Delaware, in *State ex rel. Caulk v. Nichols*,[170] rejected an attack on a state bond statute.[171] The petitioners in an argument, based on *Boddie*, asserted that they were deprived of "the fundamental right to litigate."[172] The court disagreed, declaring that "[a]dmittedly, they have had a trial in a court which had jurisdiction of the subject matter. We find no ground for holding that they have been deprived of a right to trial."[173]

Although due process does not require review, equal protection demands that once afforded, it cannot be denied arbitrarily by some economic barrier. This was the rationale in the criminal appeal in *Griffin*. It is submitted that since the civil courts are occasionally in error, like criminal courts, the necessity for review is present whether the money for bond is or is not present. As in criminal cases, if review is granted by statute to any, it ought not be limited by any criterion outside the merits of the appeal.

The most substantial inroad into overcoming appeal bonds as a barrier to the appellate courts for indigents came in the recent Supreme Court decision of *Lindsey v. Normet*.[174] In *Lindsey*, the appellants were occupying a single family residence on a month to month lease when a dispute arose concerning repairs. Alleging that they were unable to get the repairs, appellants ceased paying rent. Prior to statutory eviction proceedings, the appellant sought a declaratory judgment on the constitutionality of the Oregon Forcible Entry and Wrongful Detainer Statute (FED),[175] and injunctive relief against continued enforcement of the law. The appellants maintained, inter alia, that the provision for a bond for twice the rent in addition to the regular appeal bond,[176] as applied, was violative of their due process and equal protection rights. The appellants did not attack the constitutionality of the regular appeal bond that provided merely for the posting of a bond equal to the accruing rent.[177] Justice White, writing for the Court, applied the rationale of *Griffin* that if an appeal is allowed at all, it must be fairly administered. In this regard the double

170. 281 A.2d 24 (Del. Sup. Ct. 1971); *cf.* Harrington v. Harrington, 269 A.2d 310 (Me. 1970).
171. DEL. CODE tit. 10, §§ 9578, 9578(b,d) (Supp. 1964).
172. 281 A.2d 24, 27 (Del. 1971).
173. *Id.*
174. 92 S. Ct. 862 (1972).
175. ORE. REV. STAT. §§ 105.105-105.160 (1969).
176. ORE. REV. STAT. § 19.040; *see also* note 148 *supra*.
177. *Cf.* note 152 *supra*.

rent bond was lacking because it was not related to the objective of protecting the landlord.[178] Justice White concluded: "The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be."[179] This discrimination was termed "arbitrary and irrational"[180] and the Court found the statute invalidated by the equal protection clause.[181]

In *Lindsey* the petitioner sought access to the judicial process to defend a property interest. Although not concerned with property rights itself, *Boddie* was based on due process cases that required access for defendants to protect property interests. The only factual difference is that *Lindsey* seeks access at the appellate level and *Boddie* sought access to the judicial process at the trial level. This difference cannot account for the fact that in treating access in *Lindsey* no reference was made by the Court to their access decision in *Boddie*.[182] It is submitted that the reason must be that *Boddie* was decided on due process grounds and *Lindsey* on equal protection. However, with factual contexts so similar it is difficult to reason why the Court chose to decide one on equal protection and the other on due process.

Despite this confusion, several determinations are clear. First, the Court is now willing to apply the principles and case law of the criminal due process cases of *Griffin* and its progeny to civil litigation. *Lindsey* may surplant *Boddie* as the breakthrough in civil access for indigents if it is expanded and extended as was *Griffin*. Second, even if not extended, *Lindsey* offers a standard for appeal bonds. Appeal bonds may do no more than protect an appellee's judgment or property. Third, the language of the Court in concluding may indicate that appeal bonds that foreclose, as a practical matter, appeals of merit are suspect.[183]

V. Conclusion

In *Boddie v. Connecticut* the Supreme Court held that filing and service of process fees could not become a bar to access to the

178. 92 S. Ct. 862, 876 (1972).
179. *Id.* at 877.
180. *Id.*
181. *Id.*
182. *Id.* *See also* note 122 *supra.* Justice Black makes a connection between all the cases considered for review. Justice Black would have granted certiorari to all on the basis of *Boddie.*
183. 92 S. Ct. 862, 876-77 (1972).

divorce courts because of an indigent's inability to pay the fee. The Court at the time said that the holding was limited to the facts in the case. Subsequently, the Supreme Court in *Frederick v. Schwartz*,[184] and the United States District Court for Connecticut in *Gatling v. Butler*,[185] held that appeal filing fees cannot preempt the right to appeal because the appellant is unable to pay the filing fee. *Frederick* and *Gatling* were explicitly founded on *Boddie*. All three cases were based on the due process clause of the fourteenth amendment.

In *Lindsey v. Normet*, the Court ruled that the Oregon statute requiring a bond for an amount twice the accrued rent, in addition to a general appeal bond, was unconstitutional. The Court ruled that the bond as it operated was an arbitrary and irrational discrimination against the poor and violative of the equal protection clause of the fourteenth amendment. It is submitted that there is no evident rationale for the Court to decide any of these cases on the basis of either equal protection or due process to the complete exclusion of the other.

The explanation that the Court decided *Boddie* on the basis of the due process clause and attempted to limit the holding to divorce to allow the courts gradually to accommodate free access is no longer tenable. The decision in *Lindsey v. Normet*, predicated on the reasoning of *Griffin v. Illinois*, removes the restrictions of the due process clause that would allow access to develop fundamental right by fundamental right. *Lindsey v. Normet* subjects the courts to the rapid extention evidenced by *Griffin v. Illinois*.

Indigents have greatly benefited by the holdings in *Boddie v. Connecticut*, *Frederick v. Schwartz* and *Lindsey v. Normet*. These decisions of the Supreme Court have increased the capacity of the legal institutions to provide an alternative to violence as a means of redress for persons living in poverty.[186] It is further submitted, however, that the orderly development of the law and full benefit of this new interpretation of the law will not be achieved until the respective roles of due process and equal protection in the matter of access are made clear. This controversy should be recognized and resolved in the Supreme Court's review of *In re Kras*.[187]

PAUL J. LASKOW

184. 402 U.S. 386 (1971).
185. 52 F.R.D. 389 (D. Conn. 1971); *see also* text accompanying notes 159-161 *supra*.
186. *See* Report of the National Advisory Commission on Civil Disorders at 5-11.
187. 331 F. Supp. 1217 (E.D.N.Y. 1971) *prob. juris. noted*, 92 S. Ct. 955 (1972).